MOTION FILED

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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rules 25.5 and 25.6, Respondent Birmingham Board of Education respectfully moves this Court for permission to file the accompanying supplemental brief, which contains statistics concerning administrative enforcement by the Department of Education's Office of Civil Rights ("OCR"). During the oral argument of this matter, the Court had questions about the number of complaints filed, resolved, etc., by OCR. None of the lawyers, unfortunately, had precise data at hand. For the Court's convenience, the accompanying brief provides that data from the OCR's *Annual Report to Congress, FY 2001-2002*, which is accessible at: http://www.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html, and is subject to judicial notice.

Respectfully submitted,

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RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rules 25.5 and 25.6 and the accompanying motion for leave to file, Respondent Birmingham Board of Education respectfully submits this supplemental brief, which contains statistics concerning administrative enforcement by the Department of Education's Office of Civil Rights ("OCR"). During the oral argument of this matter, the Court had questions about the specific number of complaints filed, resolved, etc., by OCR. None of the lawyers, unfortunately, had precise data at hand. For the Court's convenience, this brief provides that data from the OCR's *Annual Report to Congress, FY 2001-2002* (hereinafter *Annual Report*), which is accessible at: http://www.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html, and is subject to judicial notice.

1. The *Annual Report* shows that during the last fourteen years, OCR has received and resolved the following number of complaints. (Please note: (1) The data include all complaints processed by OCR – *i.e.*, not only those alleging sex discrimination under Title IX, but also disability discrimination under the ADA and the Rehabilitation Act, race discrimination under Title VI, and age discrimination under the Age Discrimination Act.[1] (2) The numbers for complaints "resolved" include cases carried over from previous years.)

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1. Appendix A of the *Annual Report* shows that, during fiscal years 2001 and 2002, sex discrimination complaints accounted for 6.8% and 7.0% of all OCR complaints, respectively. The comparable numbers for disability and race discrimination claims are 53.9% (2001) and 53.8% (2002), and 18.6% (2001) and 17.6% (2002), respectively.

FY	Filed	Resolved
2002	5019	4842
2001	4571	4777
2000	4897	6364
1999	6628[2]	5369
1998	4847	4753
1997	5296	4981
1996	4828	4886
1995	4981	5559
1994	5302	5751
1993	5090	4484
1992	4432	4180
1991	3809	3497
1990	3384	3130
1989	2780	2557

2. Although the *Annual Report* does not detail the type of "resolution" in which each complaint culminated, the report does state that —

> OCR uses a variety of techniques to resolve complaints, ranging from facilitating voluntary resolutions between parties to negotiating agreements with recipients for voluntary compliance. If these methods fail, OCR issues violation letters and enters into negotiations to correct those violations. It is only after OCR has advised recipients of their failure to comply with the civil rights laws and has determined that compliance cannot be secured by voluntary means that, as a last resort, OCR seeks compliance through the administrative hearing process or refers cases to the U.S. Department of Justice.

2. The *Annual Report* reflects that in 1999, 1614 complaints were "filed by a single complainant."

The *Annual Report* thus refers to OCR's enforcement strategy as entailing a "flexible approach."

In this respect, the *Annual Report* squares with this Court's acknowledgment that agencies enforcing Title IX may leverage individual equitable relief (including reinstatement) for victims, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998) (citing *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 518 (1982)), and with the statement in the U.S. Department of Justice's *Title IX Legal Manual* that —

> agencies are encouraged to identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements, including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for violations in a nonemployment context.

U.S. Department of Justice, *Title IX Legal Manual* 155 (2001), *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf.

3. The *Annual Report* also catalogues statistics concerning the timeliness with which OCR resolves complaints submitted to it. With respect to the last three years for which statistics were available, the report shows the following:

FY	% Complaints Resolved Within 180 Days
2000	78%
2001	84%
2002	89%

4. The *Annual Report* likewise shows that, "[i]n addition to resolving complaints, OCR initiates compliance reviews and takes other proactive steps to focus on specific compliance problems that are particularly acute or national in scope." Specifically, in FY 2001, OCR initiated 21 compliance reviews and brought 43 reviews to completion; in FY 2002, OCR initiated 11 compliance reviews and resolved 18.

5. The *Annual Report* further states that, in addition to resolving individual complaints and performing compliance reviews, "OCR conducted 2,234 monitoring activities in FY 2001 and 2,343 in FY 2002."

6. Finally, the *Annual Report* shows that, in addition to its various enforcement-related duties, in an effort "to end discrimination . . . before it starts," "OCR provides technical assistance [to recipients] through a variety of methods, including onsite consultations, conferences, training, community meetings and publishing and disseminating materials."

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Respondent hopes that the foregoing information is responsive to the Court's questions at oral argument and will be of assistance to the Court in resolving this matter.

Respectfully submitted,

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